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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 919

EDITH BOARDMAN COBB, ET AL., *Petitioners*

v.

FRANK GRAHAM JOHNS, JR., ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January, 1969

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IN THE

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EDITH BOARDMAN COBB, ET AL., *Petitioners*

v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on August 30, 1968 (Appendix p. 5a).

OPINIONS BELOW

The Court of Appeals' opinion in this case, No. 21516 (Appendix pp. 1a-5a), was filed on August 30, 1968. To date, it is unreported. The District Court's opinion, Civil Action No. 1953-67 (Appendix pp. 18a-20a), was delivered orally on September 5, 1967, and is also unreported.

JURISDICTION

The Court of Appeals' judgment was entered on August 30, 1968. A petition for rehearing was filed on September 13, 1968. The Court of Appeals' Order denying the petition for rehearing was filed on October 10, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals' jurisdiction is derived from 28 U.S.C. §§ 1291 and 1294; the District Court's jurisdiction is derived from D. C. Code § 11-521 (1967 ed.).

QUESTION PRESENTED

Whether, in testamentary trusts under the wills of testatrices who died domiciled in the District of Columbia in 1928 and 1946, the word "issue" includes only the natural offspring of the life income beneficiaries named in those trusts, or whether, by reason of the retroactive application of an Act of Congress, even though that act expressly provides that it shall have no retroactive effect, the word "issue" also includes an adoptee of one of those life income beneficiaries, thereby depriving the natural offspring of their vested interest in the property without due process of law?

STATUTES INVOLVED

The following provisions of the 1901, 1951, 1961, and 1967 editions of the District of Columbia Code are printed in the Appendix pp. 27a-30a.

D. C. Code § 395 (1901)

D. C. Code § 16-205 (1951)

D. C. Code §§ 16-222(a), 16-224, 16-225 (1961)

D. C. Code §§ 16-312(a), 16-313, 16-315, 45-812, 45-823 (1967)

STATEMENT

The material facts are undisputed. They appear in the Joint Appendix which was filed in the Court of Appeals and are designated as a part of the transcript of record here.

Florence Sheffield Boardman executed her will on January 14, 1922. She died on April 25, 1928. Her daughter, Mabel Thorp Boardman, executed her will on April 28, 1944, and died on March 17, 1946. Each will was admitted to probate in the District of Columbia and each will provides for creation of a trust for the ultimate benefit of the "surviving issue" of the four natural children of Florence's only son. (The chart appearing at page 24a of the Appendix correctly reflects the relationship to the testatrices of each of the individuals named therein.)

Essentially, each trust provides (1) that income shall be paid for life to those four grandchildren of Florence (an exception immaterial in this case, is that in Mabel's will a widow of a deceased grandchild was named as a life beneficiary), (2) that as each of those named life beneficiaries dies, the income of his or her share shall be paid to his or her "surviving issue," and (3) that on the death of the last of the named life beneficiaries, principal shall be paid to their "surviving issue," per stirpes.

Of the four grandchildren (1) William Jarvis Boardman, II, died in 1938; he is survived by five natural children who are now living; his wife, Elizabeth, who had an income interest in the trust under Mabel's will, died in 1964; (2) Edith Boardman Cobb is now living and has now living two natural children; (3) Mabel Boardman Randolph died in 1953, leaving no descend-

ants surviving; (4) Florence Boardman Johns died July 7, 1964, leaving no natural children surviving, but leaving Frank Graham Johns, Jr., who was adopted by her on April 2, 1924, and who is now living.

When Florence Johns died the question arose whether her adopted son succeeded to her one-third income interest as "surviving issue," or whether all trust income was thereafter payable to Edith Boardman Cobb and the five children of William Jarvis Boardman, II. A similar question was presented with respect to distribution of trust corpus when Edith Boardman Cobb dies.

The District Court held that the word "issue" in the wills of testators who died before enactment of the present D. C. adoption law in 1954 did not include an adoptee. A panel of the Court of Appeals, with one judge dissenting, reversed.

Chronology

1895 D. C. Act passed giving adoptees right to inherit from adopter, see D. C. Code § 395 (1901)

1922 Florence Sheffield Boardman signed her will.

1924 Florence Johns adopted Frank Graham Johns, Jr.

1928 Florence Sheffield Boardman died.

1937 D. C. Act passed creating mutual rights of inheritance between the adopting parents and adopted child, but expressly confirming that the adopted child does not inherit through the adopter, see D. C. Code § 16-205 (1951).

1944 Mabel Thorp Boardman signed her will.

1946 Mabel Thorp Boardman died.

1954 D. C. Act passed affecting the meaning of "child or its equivalent" when used in a will, but not having retroactive effect, see D. C. Code §§ 16-222(a), 16-224, and 16-225 (1961)

1963 Minor revisions in phraseology in 1954 D. C. Adoption Act, see D. C. Code §§ 16-312(a), 16-313, and 16-315 (1967).

1964 Florence Johns died.

REASONS FOR GRANTING THE WRIT

1. The decision below is patently wrong. A question of great importance in the District of Columbia was decided in a way which clearly conflicts with applicable District of Columbia law. In reversing the District Court below, the two judge majority of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The decision below unnecessarily encourages litigation in already overburdened courts and it introduces great uncertainty and chaos into an important area of District of Columbia law, the law governing the construction of wills and trusts—an area where predictability and order are essential goals and where testators, their counsel, and the courts have a right to expect a substantial measure of certainty and order.

An earlier panel of the Court of Appeals said:

> . . . the testator must be presumed to have intended the result which the law has theretofore attached to the language he chose to use. *Pyne* v. *Pyne*, 154 F.2d 297, 300 (D. C. Cir. 1946).

The majority below, however, have held that the testator must be presumed to know what meaning future law will attach to the language he chooses to use. This is entirely contrary to the rational and established rules of construction which have long been used to determine a testator's intent. If this petition is denied, the problems involved in construing wills and trusts will be multiplied, not only with respect to pre-1954 instruments containing the word "issue," but also with respect to any wills or trusts containing words of art, such as "heirs, descendants," and "per stirpes."

The majority opinion ignores the overwhelming weight of authority in the District of Columbia:

Shoemaker v. *Newman,* 65 F.2d 208 (D.C. Cir. 1933);

Noreen v. *Sparks,* 204 F.2d 56 (D.C. Cir. 1953), *aff'g* 103 F. Supp. 588 (D.D.C. 1952);

Allen v. *American Security and Trust Co.,* Equity No. 55624 (D.C. Sup. Ct. 1935), *aff'd* and *rev'd* in part on other issues, *sub nom. Hepburn* v. *Winthrop,* 83 F.2d 566 (D.C. Cir. 1936);

Washington Loan & Trust Co. v. *Hensey,* Civil Action No. 17,135 (D.D.C. 1943);

Allen v. *Reed,* 17 F.2d 666, 667 (1927).

The error is aggravated—

(1) by the statement in the majority opinion that the discussion in *Shoemaker* "was inconclusive and apparently related to intestate distribution rather than testamentary intent" (Appendix p. 2a), and

(2) by the majority's reliance upon *In Re Upjohn's Will,* 304 N.Y. 366, 107 N.E. 2d 492 (1952).

The inadequacy of the legal research with respect to *Shoemaker* and the plain error which characterizes the opinion below is brought out at pp. 7a to 9a of the Appendix; it is also evidenced by the fact that the New York court's opinion in *Upjohn* supports the precise position taken by the petitioners here.

The Court of Appeals below concluded that there was nothing in the wills or in the extrinsic evidence which indicates the testatrices' intent, but then went on to include the adoptee on the basis of public policy in the 1963 D. C. adoption law. The New York court in *Upjohn* included the adoptee only because extensive extrinsic evidence was adduced at trial, including the fact that the will was executed while the testator was a guest in the adoptee's home. Had there been no extrinsic evidence of the testator's intent in *Upjohn,* the New York court would have excluded the adoptee, because it expressly rejected the rule adopted by the majority opinion below in this case. In the absence of an applicable statute this was the rule in the District of Columbia and generally is the rule elsewhere.

In *Noreen* v. *Sparks,* 103 F. Supp. 588 (D.D.C. 1952), *aff'd* 92 U.S. App. D.C. 165, 204 F.2d 56 (1953), for example, the District Court quoted with approval 70 ALR 621, which says:

> It is almost universally agreed that where a provision is made in a will for children of some person other than the testator an adopted child is presumed not to be included unless there is language in the will or there are circumstances surrounding the testator at the time he made the will, which made it clear that the adopted child was intended to be included.

Similarly, in *Wyeth* v. *Merchant*, 34 F. Supp. 785, 790 (W.D.Mo. 1940), *aff'd* 120 F.2d 242 (8th Cir. 1941), the court said:

> An examination of the encyclopedias and text books does not indicate that there is any case which holds that the word "issue," used in a will or other instrument creating a trust estate, which after a life estate in one, is given to his "issue," includes an adopted child.

Also, see 95 C.J.S. Wills § 666(c)(3)(a); *Thompson, The Law of Wills*, § 278 (2d Ed. 1936); and 4 *Bowe-Parker, Page on Wills*, § 34.22 (1961).

The decision of the Court below directly conflicts with every other related decision of that Court, every related reported decision of the United States District Court for the District of Columbia (which also sits as the District's probate court), and with the overwhelming weight of authority in other jurisdictions. The decision even conflicts with the principal authority upon which the majority below rely.

The damaging effect of the majority's decision below is already being experienced in this District. Numerous inquiries have been made by lawyers and other representatives of the city's largest banks and trust companies regarding its effect. For example, under many pre-1954 wills and trusts payments of income and principal to "issue," have for years been made only to natural offspring—with adoptees being excluded. In such cases trustees and executors are justifiably concerned. The decision is having, and if allowed to stand will continue to have, a decided unsettling effect.

2. The effect of the decision below is to confiscate the vested property interests of the natural offspring

of the life beneficiaries named in the trusts under the wills in question and, by disregarding the plain language of an act of Congress, deprive them of their property interests without due process of law.

The Supreme Court of Canada, when presented with a similar case dealing with the effect of modern legislation on the rights of adopted children under old wills, held that such legislation could not affect prior wills, unless the legislature plainly and explicitly manifested that intent, since legislation designed to affect earlier rights of adoptees would be confiscatory with respect to the rights of natural offspring. *Re Gage,* 31 D.L.R. 2d 662 (1962).

The majority below look to the 1963 D. C. adoption statute to determine the District's general policy toward adopted children and apply that policy in determining the intent of the testatrices here who signed their wills and died long before that policy was first enacted by Congress in 1954.

The existing provisions of the D. C. adoption law, D. C. Code §§ 16-312(a), 16-313, and 16-315 (1967), which reflect the changes made in 1954, and the statutory development of that law, which is set forth at pp. 12a to 14a of the Appendix, underscore the error of the decision below.

The 1954 changes in the D. C. adoption law, for the first time, gave adoptees the right to take both "from and through" their adoptive parents and defined the word "child" in a will to include an adopted child. The majority says these changes provide "a clear indication of this jurisdiction's general policy," but they overlook or intentionally ignore (1) D. C. Code § 16-

315 (1967), which expressly directs that *these new provisions shall have no retroactive effect,* and (2) H. Rept. No. 1347, 83d Cong. 2d Sess. p. 7 (1954), which says that persons objecting to the provisions enacted in 1954 "can change their wills."

It is clear error and a serious distortion of Congressional purpose for the majority below to have given the 1954 statute retroactive effect to wills of persons long deceased.

The reason Congress made the 1954 provisions non-retroactive is obvious. Income and remainder interests such as those involved here become vested when the testators involved die (see D. C. Code § 45-812 and § 45-823 (1967), and *American Security and Trust Co.* v. *Sullivan,* 72 F.Supp. 925, 931 (D.D.C. 1947), citing *Doe* v. *Considine,* 6 Wall 458 (1868)). Those vested interests should not be cut off by a change in an adoption law.

In *Irving Trust Co.* v. *Day,* 314 U.S. 556 (1942), Mr. Justice Jackson, at page 562, says there is no deprivation of property without due process of law where the New York statute involved in that case was enacted (1) before the testator whose will was involved there died, and (2) before he changed his will—because the plaintiff in that case had no vested interest in the property in question. The implication is clear that had the property interest been vested—as it was here—the New York legislation would have been declared unconstitutional or a different result would have been reached, as in *Re Gage,* 31 D.L.R. 2d 662 (1962).

The applicable decisions in other jurisdictions are to the same effect—holding that if an instrument "em-

ploys a term such as children or issue, which at the time the instrument is signed and becomes effective has a meaning exclusive of adoptees, the fact that by subsequent statute an adoptee is elevated to the status of a child or issue of the adopter will not alter the exclusionary instrument." *National City Bank* v. *Mitchell,* 13 Ohio App. 2d 141, 234 N.E. 916 (1968); and the same result was reached in *Gutman* v. *Safe Deposit & Trust Co.,* 198 Md. 39, 81 A.2d 207 (1951); *Newsome* v. *Scott,* 200 Va. 833, 108 S.E. 2d 369 (1959); *Merson* v. *Wood,* 202 Va. 485, 117 S.E. 2d 66 (1966); *Amoskeag Trust Co.* v. *Preston,* 107 N.H. 330, 222 A.2d 158, 161 (1966); *In re Trust of Pennington,* 421 Pa. 334, 219 A.2d 358 (1966); and *Security National Bank* v. *Willim,* 153 S.E. 2d 114 (W. Va. 1967).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January, 1969

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,516

FRANK G. JOHNS, JR., et al.,
Appellants

v.

EDITH BOARDMAN COBB, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia

Decided August 30, 1968

Mr. J. William Cain, Jr., with whom *Mr. John F. Doyle* was on the brief, for appellants.

Mr. John M. Bixler, with whom *Messrs. James A. Crooks, James F. Gordy and Donald H. Olson* were on the brief, for appellees.

Before BAZELON, *Chief Judge*, and WILBUR K. MILLER, *Senior Circuit Judge*, and MCGOWAN, *Circuit Judge*.

BAZELON, *Chief Judge:* This is an appeal from a judgment of the District Court holding that appellant, an adopted child, is not entitled to take under either of two wills which leave property to the "issue" of his adoptive mother. The first will was executed in 1922, two years before appellant's adoption; this was the will of his adoptive mother's grandmother. The other instrument was executed

in 1944, when appellant was 22 years old; this was the will of his adoptive mother's aunt. Each will establishes a testamentary trust the income from which is payable to the adoptive mother and her siblings (who are respectively the grandmother's grandchildren and the aunt's nieces and nephews),[1] and to their "surviving issue" *per stirpes*. Since his adoptive mother is dead, appellant claims a share under these trusts as her "issue."

We find nothing within the four corners of the wills which assists us in ascertaining what the testators intended by the word "issue." Nor do we find helpful any of the extrinsic evidence in the record.[2] And we do not believe that the question is controlled by the adoption statute which was in effect at the time each will was drafted; "it is the will that is here being construed, and not the statute." *Noreen* v. *Sparks*, 92 U.S.App.D.C. 164, 166, 204 F.2d 56, 58 (1953).

Appellees argue, however, that the controversy can be resolved merely by looking at the word "issue", which in their view has an established legal meaning that excludes adopted children. We disagree. Our cases have seldom discussed the term in relation to adoption,[3] and enough un-

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[1] Under the 1944 will, a deceased brother of the adoptive mother is replaced as a beneficiary by his surviving widow.

[2] Some courts have read significance into the fact that the will was executed subsequent to the adoption, as was the second will here, and have used this as a basis for including the adoptee within terms such as "issue." *See, e.g., In Re Upjohn's Will*, 304 N.Y. 366, 107 N.E.2d 492 (1952). While we view the time of adoption here as a factor favoring appellant, we do not attach great importance to it except to the extent that it suggests the proceedings were undertaken in good faith. *See* note 9, *supra*, and accompanying text.

[3] The only significant case of this Court which we have discovered is *Shoemaker* v. *Newman*, 62 U.S.App.D.C. 120, 65 F.2d 208 (1933). The one-paragraph discussion of the adoption problem there was inconclusive and apparently related to intestate distribution rather than testamentary intent. *Shoemaker*, moreover, was decided eleven years after execution of the first will and therefore could not have

certainty surrounds its usage that we doubt a competent draftsman who wanted to exclude adopted children would rely on the word "issue" alone to express that purpose.[4] "Terms such as 'issue' . . . may or may not include adopted children; read alone, and apart from context, those words are ambiguous." *In Re Upjohn's Will,* 304 N.Y. 366, 374, 107 N.E.2nd 492, 495 (1952).

We are left, then, without any indication of the testators' intentions regarding inclusion of appellant within the terms of their wills. It may well be that they never considered the matter at all. In such a situation, where the record and the inferences to be drawn therefrom do not suggest what the actual intent of the testator might have been, it is our duty to supply a reasonable intent by implication. Our guide in this undertaking is necessarily public policy, in accordance with which we assume the testators would have wished their wills to be interpreted.

The 1963 adoption statute of the District of Columbia provides a clear indication of this jurisdiction's general policy toward adopted children. That statute,[5] like the adop-

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influenced the first testator. Another case cited by appellees, *Noreen* v. *Sparks,* 92 U.S.App.D.C. 164, 204 F.2d 56 (1953), was concerned with the words "child or descendant" in a will executed before D.C. had an adoption statute. Even if the case has some relevance in defining the term issue, it was decided after the deaths of both testators and could not have been relied upon by either of them.

[4] *See Estate of Coe,* 42 N.J. 485, 201 A.2d 571, 577 (1964): "The cases at most attributed but *prima facie* meaning to . . . [words such as 'issue'], and a competent draftsman would not deliberately pick a word which instead of controlling the context is easily colored by it." *See also,* for an analysis of the early cases which concludes that the "primary" meaning of "issue" includes adopted children, Kales, "Rights of Adopted Children," 9 Ill.L.Rev. 149, 158-74 (1914).

[5] D.C. Code § 16-312(a) (1967) provides that "a final decree of adoption establishes the relationship of natural parent and natural child between adoptor and adoptee for all purposes. . . ." *See also* D.C. Code § 16-313 (1967).

tion statutes of many other jurisdictions,[6] accords adopted children all the rights of natural offspring. In keeping with this policy, and in view of the unmistakable trend of judicial decisions in other jurisdictions,[7] we hold that, absent any contrary indication of the testators' actual intent, appellant should be deemed to be included within the terms of the testamentary gifts to "issue" in the wills now before us.

This result, we think, is consistent with the probable preference of the great majority of testators. We have no reason to assume that these testators would have wished to discriminate against appellant "upon a biological basis."[8] There is no suggestion that his adoption was motivated by a desire to cut off other bequests under the wills.[9] Had the present testators considered the problem of adopted

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[6] *See* Binavince, "Adoption and the Law of Descent and Distribution: A Comparative Study and a Proposal For Model Legislation," 51 Cornell L.Q. 152, 159, 174 (1966).

[7] *See Estate of Heard,* 49 Cal.2d 514, 319 P.2d 637 (1957) ("lawful issue"); *Estate of Cunha,* 49 Hawaii 273, 414 P.2d 925 (1966) ("issue"); *Meek* v. *Ames,* 177 Kan. 565, 280 P.2d 957 (1955) ("children"), *Edmands* v. *Tice,* 324 S.W.2d 491 (Ky. 1958) ("children"), *limited in Wilson* v. *Johnson,* 389 S.W.2d 634 (Ky. 1965); *In Re Holden's Trust,* 207 Minn. 211, 291 N.W. 104 (1940) ("lawful issue"); *St. Louis Union Trust Co.* v. *Greenough,* 282 S.W.2d 474 (Mo. 1955) ("descendants"); *Estate of Coe,* 42 N.J. 485, 201 A.2d 571 (1964) ("lawful children"); *Delaney* v. *First National Bank,* 73 N.M. 192, 386 P.2d 711 (1963) ("lawful child or children"); *Estate of Park,* 15 N.Y.2d 413, 207 N.E.2d 859 (1965) ("issue").

[8] *Estate of Coe, supra* note 7, 201 A.2d at 575. *See also Estate of Heard, supra* note 7, 319 P.2d at 643; *In Re Patrick's Will,* 259 Minn. 193, 106 N.W.2d 888, 890 (1960).

[9] *Compare Noreen* v. *Sparks, supra* note 3, where the adoptees were 20 and 26 years old, respectively, and the adoption occurred long after the death of the testator. *See generally* Halbach, "The Rights of Adopted Children Under Class Gifts," 50 Iowa L.Rev. 971, 990-92 (1965).

children and decided to exclude them from their wills, they could have done so explicitly. In the absence of such a statement of intention, or any other evidence of testators' actual intent, we can perceive no reasonable basis for excluding appellant from sharing, as "issue" of his mother, in the proceeds of the testamentary trusts.

The judgment of the District Court is reversed and the case remanded for entry of a decree consistent with this opinion.

Reversed and remanded.

WILBUR K. MILLER, *Senior Circuit Judge,* dissents.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Judgment

This cause came to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed, and that this cause be, and it is hereby remanded to the District Court for proceedings consistent with the opinion of this Court.

Per Curiam

For the Court:

By .....
NATHAN J. PAULSON,
Clerk

Dated: August 30, 1968

Senior Circuit Judge Wilbur K. Miller dissents.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petition For Rehearing

(With Suggestion Rehearing Be In Banc)

The sole question presented in this case is whether, under the wills of testatrices who died in 1928 and 1946, an adoptee is entitled to take through his adoptive mother property left to her "issue." The District Court held that the word "issue" in the wills of testators who died before enactment of the present D. C. adoption law in 1954 did not include an adoptee. A panel of this Court, with one judge dissenting, in a decision dated August 30, 1968, reversed.

The majority opinion says there is nothing within the wills nor in any of the extrinsic evidence which indicates the testatrices' intent. In concluding that the adoptee should take, it relies primarily upon public policy as expressed in a 1963 statute (originally enacted in 1954), which enlarged the rights of adoptees to take under wills, but which Congress expressly made nonretroactive.

For the following reasons the appellees petition for a rehearing and respectfully suggest that it be a rehearing in banc.

1. With respect to the meaning of the word "issue," the decision here directly conflicts with *Shoemaker* v. *Newman,* 92 U.S. App. D.C. 164, 65 F.2d 208 (1933). If that decision is to be overruled it should be by the full Court.

2. The opinion ignores the overwhelming weight of authority, in this jurisdiction and elsewhere, that at the time the testatrices here died the word "issue" and even the words "child or descendant" excluded an adoptee; it relies upon *In Re Upjohn's Will,* 304 N.Y. 366, 107 N.E. 2d 492 (1952), a case which directly contradicts the majority's reasoning and in all respects supports the appellee's position; it disregards applicable public policy stated by Con-

gress and the well-established rules of construction which have been universally applied whenever the question presented here has been considered; if permitted to stand, the decision will effect a confiscation of vested property interests. The decision so drastically deviates from the traditional rules and is so clearly in error that the case should be reheard by this Court in banc.

3. By applying the policy which Congress adopted in 1954 for use in construing future wills and by ignoring the public policy recognized at the time of the death of these testatrices, the majority opinion also strikes down the sensible rule stated in *Pyne* v. *Pyne,* 81 U.S. App. D.C. 11, 154 F.2d 297, 300, 301 (1946),—

> the testator must be presumed to have intended the result the law has theretofore attached to the language he chose to use.

Unless changed, the decision will unnecessarily encourage litigation and will introduce uncertainty and chaos into an area of the law where predictability and order are essential goals.

I

The appellees have no quarrel with the majority's failure to find, within the four corners of the wills and from the extrinsic evidence, an indication of the testatrices' subjective intent when they used the word "issue." Furthermore, the appellees agree that it is the wills that are being construed here and not an adoption statute (although in looking to public policy for assistance in construing words used in a will the statutes in effect when the wills were signed and at the testatrices' deaths should be considered).

The majority opinion disagrees with the appellees' contention that the word "issue," when used in wills of persons who died long before enactment of the 1954 changes in the D. C. adoption law, excludes an adoptee. The opinion notes

the decision of this Court in *Shoemaker* v. *Newman,* 92 U.S. App. D.C. 120, 65 F.2d 208 (1933) but says—

> The one paragraph discussion of the adoption problem there was inconclusive and apparently related to intestate distribution rather than testamentary intent. *Shoemaker,* moreover, was decided eleven years after execution of the first will and therefore could not have influenced the first testator.

We respectfully submit that this is wrong. The majority misses the point.

A. In *Shoemaker* this Court held without reservation that an adopted son of Abner Shoemaker took no interest under Abner's grandfather's will which provided for distribution of trust corpus to Abner's "issue." The case is directly in point. This Court noted that the appeal was from a decree in a suit to construe a will and said:

> . . . a further question arose [in the court below] as to whether or not the adopted son, Louis Glover Gardiner, should succeed to the interest of his deceased father, Abner C. P. Shoemaker. (p. 210)
>
> * * *
>
> We come now to consider the rights, if any, of Louis Glover Gardiner, the adopted son of Abner C. P. Shoemaker, to whom Abner in his will attempted to convey his interest derived from the estate of his grandfather. It is settled law, we think, that an adopted child inherits only from his adopted parents, and does not inherit through the foster parents, from direct or collateral kin. (p. 214)

B. This Court's discussion in *Shoemaker* of the adoption problem there led to the conclusion that Louis, because he had been adopted, could not take under the grandfather's will as "issue." If the discussion of the adoption problem

was inconclusive, the Court's decision certainly was not; the adopted child was excluded.

C. While this Court has consistently declined (for purposes of determining whether an adoptee has a right to take through his adopter) to make any distinction between testate and intestate succession, *Shoemaker* clearly involved the interpretation of the word "issue" in a will and a number of the cases cited in *Shoemaker* on the adoption point do involve the construction of a will.

D. *Shoemaker's* significance is not that the testatrices here might have relied upon it or upon *Noreen* v. *Sparks*, 92 U.S. App. D.C. 165, 204 F.2d 56 (1953), as the majority opinion suggests is argued by the appellees, but rather that it and the other applicable authority noted below show conclusively the meaning theretofore attributed to the word "issue" and that when the testatrices signed their wills and at the times of their deaths an adoptee in the District of Columbia simply had no standing to take through his adopter.

What the appellees have done in relying upon *Shoemaker* is no different from what this Court itself did in *Noreen* when it cited *Shoemaker* to support its decision there. The fact that the will in *Noreen* was signed and became operative many years before the decision in *Shoemaker* did not prevent this Court from citing *Shoemaker* with approval and from reading the conclusion, in *Noreen*, that the adoptees there were not "children or descendants" entitled to take under the will in question.

II

The majority states:

> we doubt a competent draftsman who wanted to exclude adopted children would rely on the word "issue" alone to express that purpose. "Terms such as 'issue' . . . may or may not include adopted children; read alone, and apart from context, those words are ambiguous."

In *Shoemaker,* this Court twice said (pp. 211 and 212)—"Abner died without issue." Similarly, in *Noreen,* although the words "child or descendant" were used in the will there, this Court (including the author of the opinion here) again said (p. 57)—"the adoptive parent died without issue."

The appellees respectfully submit (1) that there was no ambiguity of meaning when in *Shoemaker* and *Noreen* this Court itself used the word "issue" and (2) that in view of the applicable case law in this jurisdiction,[1] the majority opinion is wrong if, by saying that uncertainty surrounds the usage of the term "issue," it means there was any uncertainty at the time the testatrices here signed their wills. There is no serious doubt as to what any of the eminent members of this Court deciding *Shoemaker* would have advised Florence Boardman had she asked in 1924 whether the newly adopted child would take as "issue" under her 1922 will.

The majority opinion cites *In Re Upjohn's Will,* 304 N.Y. 366, 107 N.E. 2d 492, (1952), a case involving a 1917 will, for the proposition that the word "issue" when read alone is ambiguous. The majority says—"it is our duty to supply a reasonable intent by implication," and it then applies

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[1] In addition to *Shoemaker* and *Noreen,* the other opinions in this jurisdiction have uniformly defined the word "issue" and "child," when standing alone, to exclude an adopted child. See *Allen* v. *American Security and Trust Co.,* Equity No. 55624 (D.C. Sup. Ct. 1935), *aff'd* and *rev'd* in part on other issues, *sub nom. Hepburn* v. *Winthrop,* 65 U.S. App. D.C. 309, 83 F.2d 566 (1936); *Washington Loan & Trust Co.* v. *Hensey,* Civil Action No. 17,135 (D.D.C. 1943); and *Allen* v. *Reed,* 57 U.S. App. D.C. 78, 17 F.2d 666, 667 (1927) where, while the case did not involve an adopted child, this Court said:

> The words "issue" or "lawful issue," when used in a will, are prima facie to be interpreted in their ordinary sense as embracing all future descendants, and are to be construed as words of limitation of the inheritance equivalent to the technical expression "heirs of the body."

"public policy" gleaned from the 1963 D. C. adoption statute. Significantly, the opinion in *Upjohn* directly contradicts the majority's reasoning and conclusion here and supports the precise position taken by the appellees.

The New York court included the adoptee there only after reviewing extensive evidence adduced at trial, including the fact that the will in question was executed while the testator was a guest in the home of the adoptee and her parents. It expressly rejected the majority approach, where (as expressly found by the majority) there is an absence of an indication of the testator's intent. The New York court said (304 N.Y. 374, 107 N.E. 2d 495):

> The rule in this state declared in New York Life Ins. & Trust Co. v. Viele, 161 N.Y. 11, 20, 55 N.E. 311, 314, is that the limitation ["issue"] will be construed to designate only those related to the named ancestor by blood if "there is nothing to the contrary to be found in the context of the instrument, or in extraneous facts proper to be considered." In other words, in the absence of any indication of the testator's intent, it will be assumed that the testator did not envisage adopted children taking under the limitation. . . .

The general rule stated by the New York court is the one that has been applied in this jurisdiction and elsewhere. In *Noreen* v. *Sparks,* 103 F. Supp. 588 (D.D.C. 1952), *aff'd* 92 U.S. App. D.C. 165, 204 F.2d 56 (1953), the District Court quoted with approval 70 ALR 621, which says:

> *It is almost universally agreed that where a provision is made in a will for children of some person other than the testator, an adopted child is presumed not to be included* unless there is language in the will or there are circumstances surrounding the testator at the time he made the will, which made it clear that the adopted child was intended to be included. (Emphasis added)

Similarly, in *Wyeth* v. *Merchant*, 34 F. Supp. 785, 790 (W.D.Mo. 1940), *aff'd* 120 F.2d 242 (8th Cir. 1941), the court said:

> *An examination of the encyclopedias and text books does not indicate that there is any case which holds that the word "issue,"* used in a will or other instrument creating a trust estate, which, after a life estate in one, is given to his "issue," *includes an adopted child* [absent the existence of a contrary statute when the will was signed or became effective] . . . (Emphasis added)

Also, see 95 C.J.S. Wills §666(c)(3)(a) which says—"In the absence of intention to the contrary, an adopted child may not be included in the term 'issue';" *Thompson, The Law of Wills*, §278 (2d Ed. 1936); and 4 *Bowe-Parker, Page on Wills*, §34.22 (1961), stating that the primary meaning of the word "issue" excludes an adopted child.

Accordingly, the overwhelming weight of authority both in this jurisdiction and elsewhere, is that where there is an absence of an indication of the testator's intent the word "issue" will be construed to exclude an adoptee. Even the principal authority relied upon by the majority is to the same effect.

III

The majority opinion states:

> And we do not believe that the question is controlled by the adoption statute which was in effect at the time each will was drafted; "it is the will that is here being construed, and not the statute."
>
> • • •
>
> it is our duty to supply a reasonable intent by implication. Our guide in this undertaking is necessarily public policy, in accordance with which we assume the testators would have wished their wills to be interpreted.

The 1963 adoption statute of the District of Columbia provides a clear indication of this jurisdiction's general policy toward adopted children.

The existing provisions of the D. C. adoption law, D. C. Code §§16-312, 16-313, and 16-315 (1967), and the statutory development of that law, point up the majority's error.

Prior to 1895 the fact of adoption was recognized in the District of Columbia, but the adoptee had no right of inheritance from the adopter, see *Moore* v. *Hoffman,* 2 Hayw. & H. 173, 17 Fed. Cas. 684 (D. C. Cir. Ct. 1954), and *In re Jarboe's Estate,* 235 F. Supp. 505 (D.D.C. 1964). In 1895 Congress made adopted children "heirs at law" of the adopting parents, but only of the adopting parents, D. C. Code §395 (1901). In 1937 Congress reaffirmed the adoptee's right to inherit from his adopting parent, but expressly retained the rule stated in *Shoemaker*—that an adoptee shall not inherit from collateral relatives or parents of the adopter, D. C. Code §16-205 (1941), the House and Senate District Committees stating: "The advisability of inserting this provision is obvious." H. Rept. No. 1274, 75th Cong., 1st Sess., p. 2 (1937) and S. Rept. No. 1034, p. 3.

The 1895 and 1937 legislation, in effect during the period relevant in this case, was a manifestation of the then prevailing attitude toward adopted children.

The 1954 changes in the D. C. adoption law (included in "the 1963 adoption statute" referred to by the majority), for the first time, gave adoptees the right to take both "from and through" their adoptive parents and defined the word "child" in a will to include an adopted child. The majority says these changes provide "a clear indication of this jurisdiction's general policy," but it overlooks or intentionally ignores (1) D. C. Code §16-315 (1967), which expressly directs that *these new provisions shall have no retroactive effect,* and (2) H. Rept. No. 1347, 83d Cong. 2nd Sess. p. 7 (1954), which says that persons objecting to the provisions enacted in 1954 "can change their wills."

We respectfully submit that it is a dangerous precedent and a serious distortion of Congressional purpose for this Court to give the provisions of the 1954 statute retroactive effect to wills of persons long deceased. See *Nield* v. *District of Columbia,* 71 App. D.C. 321, 110 F.2d 246, 254 (D.C. Cir. 1940).

The reason Congress made the new provisions non-retroactive is obvious. Income and remainder interests such as those involved here become vested when the testators involved die. See D.C. Code §§45-812 and 45-823 (1967) and *American Security and Trust Co. v. Sullivan,* 72 F. Supp. 925, 931 (D.D.C. 1947), citing *Doe* v. *Considine,* 6 Wall, 458 18 L ed. 869. Those vested interests should not be cut-off by a change in the adoption law.

The majority opinion concludes by referring to the "unmistakable trend of judicial decisions in other jurisdictions" and "the probable preference of the great majority of testators." While decisions in foreign jurisdictions do not control the outcome of this case, if such reference is to be made to other jurisdictions, it should be to factually comparable cases in our sister-jurisdictions of Maryland and Virginia upon whose law many District of Columbia statutes and cases are based.[2]

In those states, in situations nearly identical to the one here, adopted children were not permitted, by reason of a statutory change in the state's public policy, to defeat the vested interests of blood relatives. See *Gutman* v. *Safe*

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[2] For example, the Hearings on H.R. 7061, before the Subcommittee on Health, Education and Recreation of the House District Committee, 83d Cong., 2d Sess. p. 17 (February 25, 1954), indicate that the 1954 amendments to the District of Columbia adoption law were patterned after the 1947 Maryland adoption law. The representatives of the District of Columbia Bar Association who testified in favor of the legislation said that one purpose of the amendments was to bring the District of Columbia law more into line with Maryland and Virginia law so there would be more comity among the three jurisdictions.

Deposit N *Trust Co.*, 198 Md. 39, 81 A.2d 207 (1951), *Newsome* v. *Scott*, 200 Va. 833, 108 S.E. 369 (1959), and *Merson* v. *Wood*, 202 Va. 485, 117 S.E. 2d 66 (1966).

Furthermore, the decisions in other jurisdictions, which hold that adoptees can be "issue," are generally distinguishable on the basis of the court's reliance upon extrinsic evidence of the testator's intent. To rely upon such decisions is to disregard the weight of authority as to what the courts in this country have decided was the probable preference of the great majority of testators who signed wills and died before enactment of a "from and through" adoption law. As stated in *Nat'l City Bank v. Mitchell*, 13 Ohio App. 2d 141, 234 N.E. 2d 916 (1968):

> If the instrument-maker deliberately or with indifference cast the determination of the takers upon the law as it might stand at the later date [as when the words "heirs at law" are used], it seems clear that the circumstance of the original statutory setting should not be treated as significant. * * *
>
> The weight of authority is to the effect, however, that if the instrument reveals no such inclination to let the law take its course, but employs a term of description such as "children" or "issue," which at the time the instrument is executed and beecmes effective has a meaning exclusive of adoptees, the fact that by subsequent statute an adoptee is elevated to the status of a child or issue of the adopter will not alter the exclusionary force of the designation as it was used in the instrument. * * *

Similar results were also reached in the recent cases of *Amoskeag Trust Co.* v. *Preston*, 107 N.H. 330, 222 A.2d 158, 161 (1966), *In re Trust of Pennington*, 421 Pa. 334, 219 A.2d 358 (1966) and *Security National Bank* v. *Willim*, 153 S.E. 2d 114 (W. Va. 1967). Also, see Oler, "Construction of Private Instruments Where Adoptive Children Are Con-

cerned: II," 43 Mich. Law Rev. 901, 920 (1945), cited with approval in *Nat'l City Bank* v. *Mitchell* above.[3]

V

In the past the rules that have been used by this Court in construing wills have worked well. They are sensible and should be followed here. Where a testator's intent cannot be discerned, this Court in *Pyne* v. *Pyne,* 81 U.S. App. D.C. 11, 154 F.2d 297, 300 (1946) said:

> . . . the testator must be presumed to have intended the result which the law has theretofore attached to the language he chose to use.

The majority here, however, in effect hold that the testator must be presumed to know what meaning the law in the future will attach to the language he chooses to use. This is entirely contrary to the rational and established rules of construction relating to determining a testator's intent.

We respectfully submit that this Court should not strike down the sensible rule of construction stated in *Pyne.* To do so will unnecessarily encourage litigation and will introduce uncertainty and chaos into the law governing the construction of wills, an area where predictability and order are essential goals and where testators, their counsel, and the Courts have a right to expect such certainty and order.

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[3] The Canadian courts, too, have dealt with the problem of the effect of modern legislation on the rights of adopted children under old wills. The Supreme Court of Canada, in affirming a decision of the Ontario Court of Appeal, held that such legislation could not affect prior wills unless the legislature plainly and explicitly manifested that intent, since legislation designed to affect earlier rights of adoptees would be confiscatory with respect to the rights of natural offspring. *Re Gage,* 31 D.L.R. 2d 662 (1962).

Because of the direct conflict between the majority's decision and *Shoemaker* v. *Newman,* 92 U.S. App. D.C. 164, 65 F.2d (1933); the fact that there was a dissent from the decision here; the majority's misapprehension of the precedent relied upon and discussed; the clear error in the majority's reasoning and conclusion; and the importance of this case from the standpoint of the stability of the rules of construction to be employed in drafting and interpreting testamentary documents—the appellees request a rehearing and suggest that the case be reheard in banc.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

Before: Bazelon, Chief Judge; Wilber K. Miller, Senior Circuit Judge; and McGowan, Circuit Judge, in Chambers.

Order

On consideration of appellees' petition for rehearing, it is ORDERED by the Court that appellees' aforesaid petition is denied.

Per Curiam.

Ruling of the Court

THE COURT: (The Honorable Alexander Holtzoff, United States District Judge.)

The question to be determined in this case is whether the "issue" who are entitled to certain remainder interests under the will of Florence Sheffield Boardman and the will of Mabel Thorp Boardman include the adopted child.

The will of Florence Sheffield Boardman was executed in 1922; she died in 1928.

The Will of Mabel Thorp Boardman was executed in 1944 and she died in 1946.

The 1901 District of Columbia Code, section 395, provided in regard to the adoption of children that if the Judge should find that the petitioner was a proper person to have custody of the child, and that the parent or parents or guardian of such child have given their permission for such adoption, he shall enter an Order upon the records of the Court legalizing such adoption and make such child an heir-at-law of such Petitioner, the same as if such child was born to such Petitioner."

In other words, the 1901 Code provided that an adoption would make an adopted child an heir at law just as though he had been born to the Petitioner.

There is a difference between "a child", "an heir at law" and "issue". A child may be a stepchild or an adopted child. An heir at law may be a person who is not a child of the deceased; but the word "issue" necessarily means issue of a person's body. It includes natural born children of the deceased, natural born grandchildren and so on.

Judge Bailey so held in an unreported case, Hebron versus Winthrop, affirmed by the Court of Appeals in 65 Appeals DC at 309, without, however, discussing this specific question.

This provision of the Statute remained in effect until 1954. There was some change in the adoption laws during that period, but none so far as this specific provision is concerned.

In 1954 the Law was changed and is now found in District of Columbia Code, Title 16, Section 312, subsection (a), which provides as follows:

> "That a final decree of adoption establishes the relationship of natural born and natural child between adoptor and adoptee for all purposes, including mutual rights of inheritance and succession, as if adoptee were born to adoptor."

This 1954 Statute obviously broadened the rights of the adopted child. It provided, in effect, that he shall be treated as a natural born child for all purposes. That was not the law previously.

However, Section 315 of the same Title provides that the provisions of the Act to which reference has been made shall have no effect prior to June 8, 1954, except to the extent that the Act specifically so provides.

It then goes on: "They"—that is to say, the provisions of the chapter—"do not affect in any way the rights and relations obtained by any decree of adoption entered prior to

June 8, 1954." In other words, the adopted child in this instance cannot receive the advantage of the 1954 Statute.

The Court perceives no reason for not following Judge Bailey's Decision to the effect that the word "issue" under the pre-existing Statute shall not include an adopted child.

It is of some importance that this case went to the Court of Appeals, but the Court of Appeals was silent on this particular point. It is particularly important in dealing with rights of property to follow the precepts of stare decisis.

The Court does feel that there is a strong human appeal in favor of treating an adopted child as a natural-born child; both adoptive parents so look upon their adopted child, but we are dealing here with property rights and the Court must strictly follow the Statute and the precedents construing the Statute.

In view of these circumstances, the Court reaches the conclusion that the wills should be construed so that the term "issue", wherever it is used, shall not include the adopted child.

Counsel may submit a proposed Order in conformity with this decision.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SECURITY AND TRUST COMPANY as Trustees u/w of Florence Sheffield Boardman and as Trustee u/w of Mabel Thorp Boardman, *Plaintiff*

v

EDITH BOARDMAN COBB, ET AL., *Defendants*

Civil Action

No. 1953-65

Summary Judgment

Upon consideration of the Last Will and Testament of Florence Sheffield Boardman dated January 14, 1922, admitted to probate in this Court in Administration No. 37,392, and of the Last Will and Testament of Mabel Thorp Boardman dated April 28, 1944, admitted to probate in this Court in Administration No. 67,037, and of the Motion of the Plaintiff, American Security and Trust Company, as Trustee under said Wills, for Judgment on the Pleadings, the Cross-Motion for Summary Judgment filed on behalf of Defendants Edith Boardman Cobb et al., the Motion for Summary Judgment filed by the Guardian at Litem for the minor Defendants Jeffrey Bitner Cobb et al., the Motion for Summary Judgment filed on behalf of Defendant Frank Graham Johns, Jr., and the Motion for Summary Judgment filed by the Guardian ad Litem for the minor Defendants Frank Graham Johns, III, and Sandra Blair Johns, and the affidavits and exhibits filed herein, and treating all of said motions as motions for summary judgment, and the matter having been heard in open court, and it appearing that Defendant Frank Graham Johns, Jr., is the adopted son of Florence Boardman Johns, deceased, and it appearing to the court that the pleadings, exhibits and affidavits on file show that there is no genuine issue as to any material fact and that certain of the moving parties are entitled to judgment as a matter of law, it is this 2nd day of October, 1967,

ORDERED, ADJUDGED and DECREED

1. That the Motions for Summary Judgment filed on behalf of the Defendants, Frank Graham Johns, Jr., Frank Graham Johns, III, and Sandra Boardman Johns, are denied.

2. That the Motion for Judgment on the Pleadings filed by the Plaintiff-Trustee, asking the instructions of this Court with respect to the Wills of Florence Sheffield Boardman and Mabel Thorp Boardman, is granted.

3. That the Motions for Summary Judgment filed on behalf of Defendants Edith Boardman Cobb et al., and on behalf of Defendants Jeffrey Bitner Cobb et al., are granted.

4. That Item VIII of the Will of Florence Sheffield Boardman and particularly the words "the surviving issue" and "then surviving issue" appearing therein are construed not to include Frank Graham Johns, Jr., the adopted son of Florence Boardman Johns, and his children, the minor defendants, Frank Graham Johns, III, and Sandra Blair Johns, as beneficiaries of the trust created by said Item VIII.

5. That paragraph (b) of Item VIII of the Will of Mabel Thorp Boardman, and particularly the words "the surviving issue" and "then surviving issue" appearing therein are construed not to include Frank Graham Johns, Jr., the adopted son of Florence Boardman Johns, and his children, the minor defendants, Frank Graham Johns, III, and Sandra Blair Johns, as beneficiaries of the trust created by said Item VIII, paragraph (b).

6. That Frank Graham Johns, Jr., and his children, Frank Graham Johns, III, and Sandra Blair Johns, are not "issue" of Florence Boardman Johns within the meaning of either of said wills and are not entitled to share either in

the income of the trusts created thereby or in the distribution of the principal thereof upon termination of the trusts.

ALEXANDER HOLTZOFF
Judge

Presented by:

CRAIGHILL & AIELLO
By Llewellyn C. Thomas
Attorneys for plaintiff

Seen:

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Attorney for defendant,
Edith Boardman Cobb,
et al.

James A. Crooks
Guardian ad litem for
Jeffrey Bitner Cobb, et al.

J. William Cain, Jr.
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and Sandra Blair Johns

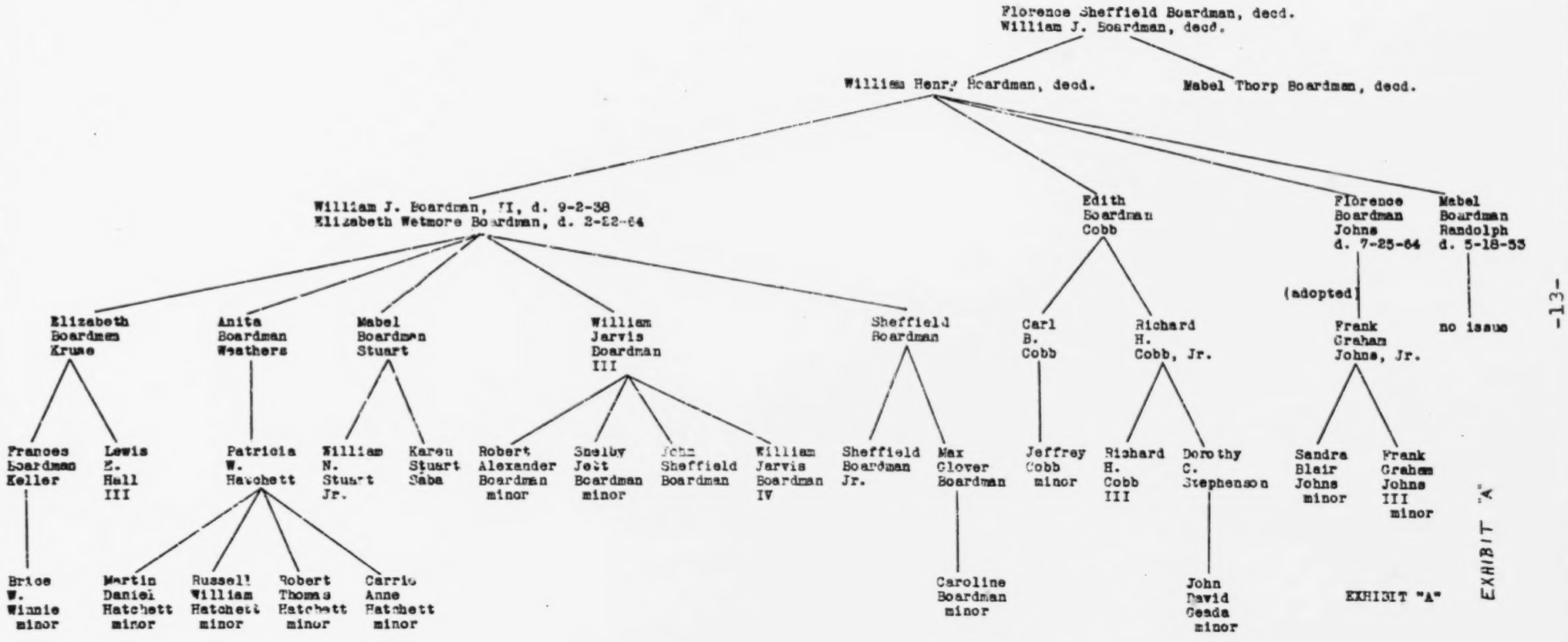

EXHIBIT "A"

EXHIBIT "A"

Will of Florence Sheffield Boardman

ITEM VIII: I give and bequeath the sum of Two Hundred Thousand Dollars ($200,000.) unto the aforesaid American Security and Trust Company, as trustee, *in trust,* to hold the same with full discretionary powers of management, of investment, sale and reinvestment, and to keep the same invested, collect all revenue and income arising therefrom, and, after paying all such costs, charges and expenses as it may deem necessary or proper in the administration of this trust, to pay over the net income arising therefrom, in semi-annual or quarterly payments, in the discretion of my trustee, share and share alike, unto my dear grandchildren, William J. Boardman II, Edith Boardman Cobb, Florence Boardman Johns, and Mabel Boardman Randolph, the surviving issue, however, of any thereof who may die either before or after my death, to take, *per stirpes,* the share of such net income the deceased ancestor would have taken if living. If any of my said grandchildren should predecease me, leaving no issue him, her or them and me surviving, or, in the event of any thereof dying leaving issue which issue shall thereafter wholly fail before the termination of this trust as hereinafter provided, the share or shares of net income of the one or ones so dying shall inure to the benefit of and become a part of the shares or share of the survivors or survivor, as the case may be. Upon the death of the last survivor of my said grandchildren, or when that time shall first arrive when no lineal descendent of my said grandchildren living at the time of my death shall be under the age of twenty-five (25) years, whichever event shall last occur, this trust shall cease and determine, and my trustee shall transfer, assign and pay over the entire trust fund then remaining in its hands, absolutely and in fee simple, *per stirpes,* unto the then surviving issue of my said grandchildren, or, if no such issue shall then survive, then, *per stirpes,* unto my then surviving heirs-at-law, according to the laws then in force in the District of Columbia.

(b) Three (3) of said ten (10) parts or shares shall be assigned, transferred and delivered unto the AMERICAN SECURITY AND TRUST COMPANY, a corporation organized under the laws in force in the District of Columbia and having its principal office and place of business in the City of Washington in said District, its corporate successor by consolidation, merger, purchase or otherwise, *in trust,* to hold the same with full discretionary powers of management, of sale and resale, of investment and reinvestment, and to keep the same invested, collect all rents, revenue and income arising therefrom, and after paying all such costs, charges and expenses as it may deem necessary or proper in the administration of this trust, to pay over the net income arising therefrom, share and share alike, unto those of the following persons surviving from time to time, namely, (1) ELIZABETH WETMORE BOARDMAN, widow of my nephew, William Jarvis Boardman; (2) EDITH BOARDMAN COBB, my niece; (3) FLORENCE SHEFFIELD BOARDMAN JOHNS, my niece, and (4) MABEL BOARDMAN RANDOLPH, my niece, the surviving issue of any of said persons who may predecease me or who may die before the termination of this trust to take, *per stirpes,* the share or shares of net income the deceased ancestor would have been entitled to if living. Upon the death of the last survivor of said four (4) persons, this trust shall cease and determine, and my Trustees shall thereupon transfer, assign and pay over the *principal* of said trust fund then remaining in its hands unto the then surviving issue of said four (4) persons, or the survivor of them, absolutely and in fee simple, *per stirpes.*

STATUTES INVOLVED

D. C. Code § 395 (1901)

Jurisdiction is hereby conferred on any judge of the supreme court of the District of Columbia to hear and determine any petition that may be presented by a person or a husband and wife residing in the District of Columbia, praying the privilege of adopting any minor child as his or her or their child, and making such minor child an heir at law. If the judge shall find, upon the hearing of such petition, that the petitioner is a proper person to have custody of such child, and that the parent or parents or guardian of such child have given their permission for such adoption, he shall enter an order upon the records of the court legalizing such adoption and making such child an heir at law of such petitioner, the same as if such child was born to such petitioner. If the child has no parent or guardian the judge shall appoint a guardian ad litem.

D. C. Code § 16-205 (1951)

Entry of the final decree of adoption shall establish the relation of natural parent and natural child between adoptor and adoptee for all purposes including mutual rights of inheritance and succession the same as if adoptee was born of adoptor, except that adoptee shall not inherit from collateral relatives of or the parents of adoptor although such collateral relatives and parents of adoptor shall have the right of inheritance from adoptee. All rights and duties including those of inheritance and succession between adoptee, his or her natural parents, their issue, collateral relatives, and so forth, shall be cut off. In the event one of the natural parents shall be the spouse of petitioner, then the rights and relations as between adoptee, such natural parent, and his or her parents and collateral relatives, including mutual rights of inheritance and succession, shall in no wise be altered.

D. C. Code § 16-222(a) (1961)

(a) A final decree of adoption shall establish the relationship of natural parent and natural child between adoptor and adoptee for all purposes, including mutual rights of inheritance and succession the same as if adoptee was born to adoptor. Such adoptee shall take from, through, and as a representative of his adoptive parent or parents in the same manner as a child by birth, and upon the death of an adoptee intestate, his property shall pass and be distributed in the same manner as if such adoptee had been born to such adopting parent or parents in lawful wedlock. All rights and duties including those of inheritance and succession between the adoptee, his natural parents, their issue, collateral relatives, and so forth, shall be cut off, except that in the event one of the natural parents is the spouse of the adoptor, then the rights and relations as between adoptee, such natural parent, and his parents and collateral relatives, including mutual rights of inheritance and succession, shall in nowise be altered.

D. C. Code § 16-224 (1961)

§ 16-224. Term "child" to include adopted persons.

The term "child" or its equivalent in a deed, grant, will, or other written instrument shall in the District, be held to include any adopted person, unless the contrary plainly appears by the terms thereof, whether or not such instrument was executed before or after the entry of the interlocutory decree of adoption, if any, or before or after the final decree of adoption became effective. (June 8, 1954, 68 Stat. 246, ch 272, §17.)

D. C. Code § 16-225 (1961)

§ 16-225. Provisions not retroactive—Prior orders and decrees.

The provisions of this chapter shall have no retroactive effect except to the extent that they specifically so provide and shall not be construed as affecting in any way the

right and relations obtained by any decree of adoption entered prior to June 8, 1954, and all proceeding instituted and pending on June 8, 1954, shall be carried to their final determination in accordance with former Sections 16-201 to 16-207, and all orders and decrees entered therein shall remain valid and binding on all parties thereby affected. (June 8, 1954, 68 Stat. 246, ch 272, § 18(b).)

D. C. Code § 16-312(a) (1967)

§ 16-312. Legal effects of adoption

(a) A final decree of adoption establishes the relationship of natural parent and natural child between adoptor and adoptee for all purposes, including mutual rights of inheritance and succession as if adoptee were born to adoptor. The adoptee takes from, through, and as a representative of his adoptive parent or parents in the same manner as a child by birth, and upon the death of an adoptee intestate, his property shall pass and be distributed in the same manner as if the adoptee had been born to the adopting parent or parents in lawful wedlock. All rights and duties including those of inheritance and succession between the adoptee, his natural parents, their issue, collateral relatives, and so forth, are cut off, except that when one of the nautral parents is the spouse of the adoptor, the rights and relations as between adoptee, that natural parent, and his parents and collateral relatives, including mutual rights of inheritance and succession, are in no wise altered.

D. C. Code § 16-313 (1967)

§ 16-313. Child as including adopted person.

In the District, "child" or its equivalent in a deed, grant, will, or other written instrument includes an adopted person, unless the contrary plainly appears by the terms thereof, whether the instrument was executed before or after the entry of the interlocutory decree of adoption,

if any, or before or after the final decree of adoption became effective. (Dec. 23, 1963, 77 Stat. 541, Pub. L. 88-241, § 1, eff. Jan. 1, 1964)

D. C. Code § 16-315 (1967)

§ 16-315. Prior proceedings.

The provisions of this chapter have no effect prior to June 8, 1954, except to the extent that they specifically so provide. They do not affect in any way the rights and relations obtained by any decree of adoption entered prior to June 8, 1954. (Dec. 23, 1963, 77 Stat. 542, Pub. L. 88-241, § 1, eff. Jan. 1, 1964.)

D. C. Code § 45-812 (1967)

§ 45-812. Vested and contingent future estates.

A future estate is vested when there is a person in being who would have an immediate right to the possession of the land upon the expiration of the intermediate or precedent estate, or upon the arrival of a certain period or event when it is to commence in possession. It is contingent when the person to whom or the event upon which it is limited to take effect in possession or become a vested estate is uncertain. (Mar. 3, 1901, 31 Stat. 1351, ch. 854, § 1022.)

D. C. Code § 45-823 (1967)

§ 45-823. Provisions applicable to personal property.

All the provisions of this chapter and of sections 45-102 to 45-104, 45-203, 45-204, shall apply to personal property generally except where from the nature of the property they are inapplicable. (Mar. 3, 1901, ch. 854, § 1036, part, as added June 30, 1902, 32 Stat. 538, ch. 1329.)

SUPREME COURT, U. S.

FEB 5 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 919

EDITH BOARDMAN COBB, ET AL.,
Petitioners

v.

FRANK GRAHAM JOHNS, JR., ET AL.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This is a case involving the issue whether an adopted child is entitled to take under two wills which leave property to the "issue" of his adoptive mother. The first will was executed in 1922, two years before appellee's adoption, this being the will of his adoptive mother's grandmother. The second will was executed in 1944, when appellee was 22 years old, this being the will of his adoptive mother's aunt. Each will establishes a testamentary trust, the income of which is payable to four life beneficiaries, including the adoptive mother, and to their "surviving issue" *per stirpes*. Upon termination, the trusts are to be divided among the then surviving issue of each of the life beneficiaries, *per stirpes*. Because the adoptive mother is dead, the adopted son claims a share under such trusts as her "issue." The family chart, appearing at page 24a

of the Appendix to the Petition for Writ of Certiorari, contains the essential facts with respect to heirs.

The United States Court of Appeals for the District of Columbia Circuit held that, in the absence of an intention to exclude adopted children, the adopted child should be included and share in the wills as "issue" of his mother. *Johns* v. *Cobb*, 402 F. 2d 636 (D. C. Cir. 1968).

QUESTION PRESENTED

The sole question before this Court is whether, in the circumstances, this Court should consider and pass upon a decision of the United States Court of Appeals for the District of Columbia Circuit which solely declares a rule of law local to the District of Columbia.

STATEMENT

The material facts are undisputed. They appear in the Joint Appendix which was filed with the Court of Appeals, are designated as a part of the transcript of record here, and are summarized at pages 3 and 4 of the Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

Petitioner does not allege the existence of a federal question but, apparently, urges that the Court below has decided an important question in conflict with the applicable local law, so as to call for an exercise of this Court's power of supervision as contemplated by Rule 19(b) of this Court.

Petitioner fails to point out where the holding below, namely that absent a showing of a contrary intent a testatrix will be presumed to have intended to include an adopted child, differs from any prior adjudication on analogous facts. For example, throughout this proceeding, respondent here has urged that under law adopted chil-

dren must be included within a class of remaindermen, absent a contrary intent, and absent the use of adoption as a device to cut off remainders.

The decision below is not in conflict with applicable law, is a matter of local concern to the District of Columbia, and concerns a question which is of a type not normally considered by this Court.

The instant case concerns testatrices of the District of Columbia disposing of property located in the District, and concerns facts unlike any heretofore presented to District of Columbia Courts.[1] On the material facts the District of Columbia Courts might decide, as a matter of local law applying to local situations, either way and, "when the choice of the Court of Appeals of the District of Columbia in local matters between legal conclusions seems nicely balanced, we do not interfere." *Fisher* v. *United States*, 328 U.S. 463 (1946). This policy has consistently been followed. See *Griffin* v. *United States*, 336 U. S. 704 (1949); *Miller* v. *United States*, 357 U. S. 301 (1958).

Petitioners, in urging a presumption of exclusion, rely upon cases which are factually inapposite. *Shoemaker* v. *Newman*, 65 F. 2d 208 (D. C. Cir. 1933) held that an adopted child inherits only from its adoptive parents, and does not inherit through the foster parents from direct or collateral kin. The will in *Shoemaker* was probated in 1891 and, thus, execution of the will and the death of the testator were prior to the first District adoption statute,[2] and during a period when adoption was not recognized at common law. *Noreen* v. *Sparks*, 204 F. 2d 56 (D. C. Cir. 1953), where testator executed the will in 1879 and died in 1880, is subject to the same infirmity. Moreover, *Shoe-*

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[1] The only analogous case is *Platt* v. *National Metropolitan Bank*, C.A. No. 1297-59 (D.D.C. not rep't'd), where the will concerned "children" and summary judgment was granted in favor of the adopted child.

[2] D.C. Code § 395 (1901).

maker, was decided eleven years after execution of the first will here involved and could not have influenced the first testatrix. *Noreen* was concerned with "child or descendant" in a will executed before the first District adoption statute. It was decided after the death of each testatrix here and could not have been relied upon by either. Here, the infant was adopted at a time when D. C. Code § 395 (1901) was in force and which declared that an adopted child became "an heir at law . . ., the same as if such child was born to such petitioner."

Allen v. *American Security and Trust Company*, Equity No. 55,624 (D.D.C. 1935), affirmed and reversed in part on other issues, *sub nom Hepburn* v. *Winthrop*, 83 F. 2d 566 (D. C. Cir. 1936), held that the word "issue" could not include adopted children for the reason that the children were adopted subsequent to the death of the testator, which is not the case here. *Allen* v. *Reed* 17 F. 2d 666 (1927) itself states that "issue" is not inflexible.

Petitioners, in urging a presumption of exclusion, have cited below such cases as *Pennington* v. *Citizens Fidelity Bank and Trust Co.* (Ky. 1965) 390 S.W. 2d 671, where a husband, age 74, was adopted by his wife, age 71, in order to take under a will leaving a remainder to the wife's "children." The husband's claim under the will was denied. Consistently, petitioners now cite cases such as *National City Bank of Cleveland* v. *Mitchell*, 13 Ohio App. 2d 141, 234 N.E. 2d 916 (1968), where the adoption took place two years *after* the settlor's death. In *Merson* v. *Wood*, 202 Va. 485, 117 S.E. 2d 661 (1961), the Court held that a 24 year old woman, adopted by the son of testatrix 37 years after her death, was not an "heir" of the son within a will devising land to the son for life "and if he dies without heirs" remainder to three children of testatrix. The Court, in *Merson*, found that "the appellant was adopted solely for the purpose of permitting her to take the property . . ." (117 S.E. 2d at 664). In *Newsom* v. *Scott*, 200 Va. 833, 108 S.E. 2d 369 (1959), the adopted

son was 20 years of age at adoption, which was 32 years after testator's death, and, had the adopted son prevailed, he would have defeated, entirely, the rights of testator's grandchildren.

The differing factual situations are clear. On the one hand, where there is a good faith adoption prior to the testator's death and absence of any contrary intent in the will, the testator is held to have intended that the adopted child would come within the class of remaindermen when that class is described as "children," "lawful issue," *et cetera.* On the other hand, when there is an adoption purposefully designed to cut off existing rights of remaindermen, the claim of the adopted child must fail. Compare *Edmonds* v. *Tice* (Ky. 1959) 324 S.W. 2d 491 and *Wilson* v. *Johnson* (Ky. 1965) 389 S.W. 2d 634.

The assertion that the holding of the Court below effected a confiscation of vested property rights and thus created a constitutional issue is without merit. It begs the very question at issue by assuming that no vested property right existed in any one other than petitioners. The Court below held to the contrary. Thus, under local law there could not have been any diminution of any interest of petitioners.

Petitioners erroneously assert that the Court below misapplied applicable statutes.[3] The proceeding below involved construction of wills, not construction or interpretation of statutes relating to inheritance. This is not a case of inheritance, but of construction of wills the makers of which were domiciled in the same jurisdiction, and the construction of which have no compelling effect upon other jurisdictions. Even if the statutes were involved, this Court has stated: "We will not ordinarily review decisions of the United States Court of Appeals which are based upon statutes so limited or which declare the com-

[3] D.C. Code § 395 (1901), D.C. Code § 16-205 (1951), D.C. Code § 16-222(a), 16-224, 16-225 (1961), D.C. Code §§ 16-312(a), 16-313, 16-315, 45-812, 45-823 (1967).

mon law of the District." *Del Vecchio* v. *Bonnie L. Bowers*, 296 U.S. 280, 285 (1935); *District of Columbia* v. *Pace*, 320 U.S. 698, 702 (1944).

The law declared by the Court below of a presumption of inclusion of adopted children within a class of remaindermen, absent a contrary intent, not only concerns a matter of law local to the District of Columbia, but is also clearly correct.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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